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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

ROXANNE SEEMAN, Plaintiff and Appellant, v. HENRY KAWAMOTO, Jr., Defendant and Respondent.	B281335 (Los Angeles County Super. Ct. No. BC540495)

APPEAL from a judgment of the Superior Court of Los Angeles County, David S. Cunningham, Judge. Affirmed.

Law Office of Gerald Philip Peters and Gerald P. Peters for Plaintiff and Appellant.

Cole Pedroza, Kenneth R. Pedroza, Tammy C. Weaver; Taylor Blessey and Raymond L. Blessey for Defendant and Respondent.

* * * * * * * * * *

Plaintiff Roxanne Seeman sued defendant Dr. Henry Kawamoto, Jr. for medical negligence, claiming he failed to meet the standard of care in performing a December 27, 2012 cosmetic surgery on her left eyelid, during which plaintiff suffered an unexplained injury. Following trial, the jury returned a special verdict in defendant's favor, finding he was not negligent. Plaintiff appeals, arguing defendant's counsel repeatedly violated the court's in limine order excluding evidence of prior cosmetic surgeries, and that substantial evidence does not support the verdict. We affirm.

BACKGROUND

1. Trial Court's In Limine Ruling

Before trial, plaintiff moved in limine to exclude evidence of any of her prior cosmetic surgeries, reasoning they were irrelevant.

Defendant opposed, arguing that plaintiff has an extensive surgical history, consisting of nearly a dozen cosmetic surgeries and also chemical peels, dating back to the 1990's. Defendant had performed at least six procedures on plaintiff's eyelids between 1993 and 2012. In his deposition, defendant's expert opined that "anytime you operate on an eyelid that's had so much done to it in the past, the vascular supply could be compromised and things like [the injury in this case] can happen."

Plaintiff conceded that surgeries performed by defendant in 2007 and 2010 upon her left eyelid were relevant to her claims arising from the 2012 surgery. Therefore, the trial court ruled that evidence of the 2007 and 2010 surgeries could be admitted, and that it would consider the relevance of other procedures by

conducting additional Evidence Code section 402 hearings outside the presence of the jury.

2. Plaintiff's Evidence

Plaintiff went to see defendant in 2007 because she "heard he was a renowned . . . doctor" who specialized in reconstruction. She "had some wrinkles" and did not want to go to a "regular Beverly Hills plastic surgeon[]" but wanted a "more . . . serious doctor."

During the initial consultation, defendant's nurse suggested plaintiff have a surgery to give her "smiley eyes," where the doctor uses a stitch to pull up the corner of the eye. Defendant also recommended that plaintiff undergo a "facelift and . . . some other things" during the procedure on her eyelids. Plaintiff went along with the recommendations because defendant was "renowned."

The surgery was in December 2007. Before the surgery, defendant cautioned that plaintiff's eyelids would be "overcorrected temporarily" but they would eventually settle into the proper position.

Following the surgery, plaintiff felt like her left eye was sewn shut. Over the next couple of months, she followed up with defendant to express her concerns. On January 8, 2008, defendant told her he could release the stitch in her left eyelid to correct the problem, but that in time, the corner of her left eye would eventually settle into place.

In late 2009, plaintiff returned to defendant, after another doctor referred her to have a precancerous growth removed from her nose. When she saw defendant, she asked if he could release the stitch in her left eyelid during the procedure to remove the growth. Defendant recommended surgery to fix a condition he

called "ptosis," where the upper eyelid margin droops down. He referred plaintiff to an ophthalmologist who diagnosed her with slight ptosis.

On March 10, 2010, plaintiff underwent surgery with defendant to remove the precancerous growth, to fix the ptosis, and a chemical peel. After the surgery, she did not notice any relief of the tightness in her left eyelid, and she discussed with defendant the possibility of an additional surgery to address the problem.

On December 27, plaintiff had surgery to her left eyelid, a chemical peel, and fat grafting. When plaintiff woke up from surgery, she had a massive bandage over her left eye. Defendant told her that during the procedure, his nurse noticed that her eyelid was bleeding. "[S]omething had happened, he didn't know what happened, but there was . . . a piece of skin missing from [her] eyelid . . . . [T]hey took a . . . crease of skin that was in the crease of [her] eyelid that he had removed and they . . . sewed it to the margin of [her] eyelid where this piece of skin . . . was missing." Defendant did not know how the injury occurred; it was a "mystery."

Plaintiff returned to the clinic on December 30 because she was in so much pain. When defendant removed the bandage, plaintiff's eye looked "ghastly" and "bludgeoned."

In the days following the surgery, plaintiff's eyelid felt like a "twisted rag" or an "inside out" sock. She last saw defendant on January 2, 2013. He told her to "give it some time."

On January 4, 2013, plaintiff saw a new doctor. Dr. Henry Baylis told plaintiff she had a notch in her eyelid as a result of the surgery. Dr. Baylis recommended a series of surgeries to correct the eyelid. He referred plaintiff to an ophthalmologist,

Dr. Troy Elander, because the eyelashes in plaintiff's left eye were growing inward, due to the notch on her eye, and were scratching her cornea and causing irritation. Dr. Elander treated plaintiff by pulling out the lashes which were growing inward.

Plaintiff was prescribed special eyedrops, which she uses eight times per day. She has to have the inward growing eyelashes removed every four to six weeks.

Defendant's nurse, Toni Ellis, testified that during the surgery, she noticed "a small defect at the outer upper edge of the eyelid by the eyelashes about one to two millimeters." It was a "separation of tissues." She did not know how the injury occurred.

Defendant testified that he did not know how the injury occurred. The 2012 procedure went "flawlessly . . . nothing abnormal happened in it." When asked whether plaintiff's eyelids were thin and friable, he testified that all eyelid skin is thin and friable.

Plaintiff's expert, Dr. John Shamoun, is a board-certified general surgeon, plastic surgeon, facial plastic surgeon, and is board certified in forensic medicine. He testified that during surgery, normal complications can occur which do not result from any deviation from the standard of care.

According to Dr. Shamoun, "[t]his particular case involves a young lady who had had multiple cosmetic[] surgeries on or about the face. . . . [¶] She had multiple surgeries in the past and presented with some requests to improve her face. Those procedures were performed. Subsequently she had more and more procedures on or about the same area. [¶] She presented in 2007, having previously undergone numerous procedures prior to that, where she had the corners of her eyes elevated." The 2012

surgery was to fix plaintiff's ptosis. It was plaintiff's second surgery to repair this condition. During the 2012 surgery, an area of skin at the eyelid margin was damaged, and a notch was taken out of the eyelid. The notch was not near the incision site to fix the ptosis.

Dr. Shamoun opined that the injury was a deviation from the standard of care "because it's a lapse of quality or control at the time of surgery. It would ordinarily not occur." He opined that such an injury cannot occur in the absence of a departure from the standard of care. The injury could have occurred because of a burn by the cautery instruments, or because "a metal instrument arched." He testified that damaging the eyelid margin during surgery with an instrument, or burning it with a tool, would have been negligent.

He did not believe the injury could have been caused by thin and friable skin or vascular compromise.

3. Defendant's Evidence

Dr. Steven Dresner is an ophthalmic plastic surgeon, with special training in eyelids, tear ducts, and the bones near the eyes. He has performed the surgery at issue in the case between 15 and 20 times, and has done 15,000 to 20,000 eyelid surgeries. He reviewed plaintiff's medical records and the deposition testimony, and he examined plaintiff.

Dr. Dresner opined that defendant practiced within the standard of care during the 2012 procedure. There was a "minor complication which could easily have been corrected. People get complications all the time in surgery. It doesn't mean they're negligent. Things happen. He tried to repair it at the time of the surgery. But he was well within the standard of care."

He described plaintiff's injury as a "separation of the skin near the lid margin" that defendant repaired with a small skin graft. He has seen this type of complication with eyelid surgeries "many, many times."

When asked whether he investigated whether thin and friable skin could lead to the injury, he testified that he "could see from [plaintiff's] history and the records how many surgeries she has had. She has had many surgeries, cosmetic surgeries in general and a number of surgeries in the upper eyelid and lower eyelid. [¶] The more you operate, the more scar tissue, the more the vascular supply to the eyelids can be compromised, and you can also have very thin and friable skin." Such a tearing is not a breach of the standard of care. Instead, it is a minor complication.

Given a hypothetical tracking the facts of the case, Dr. Dresner disagreed that the only possible cause of the injury was negligence. He opined that it was unlikely that the injury was caused by an instrument or cautery tools.

Defendant testified that when he noticed the injury during plaintiff's surgery, there was no bleeding. He did not use any cautery instruments during the surgery.

4. Verdict and Motions for a New Trial and Judgment Notwithstanding the Verdict

The jury, by special verdict, found that defendant was not negligent.

Plaintiff moved for a new trial, and for judgment notwithstanding the verdict, arguing that she produced substantial evidence of negligence under a res ipsa loquitur theory, and that defendant presented no evidence to rebut the presumption of negligence. The trial court denied the motions.

ANALYSIS

1. Misconduct by Counsel

Plaintiff claims that defense counsel engaged in numerous instances of misconduct, by referring to prior surgeries in violation of the trial court's in limine order, and by eliciting testimony in violation of the order. We detail them, below, adding some background facts for context where appropriate.

a. Facts

i. Opening statement

In defendant's opening statement, when discussing plaintiff's 2007 surgery, counsel stated that plaintiff had consulted with defendant over the aging in her eyes, and that she and defendant "sat down and looked at photographs of her that had been taken in his office ten years earlier." Plaintiff's counsel did not object.

ii. Cross-examination of plaintiff

Defense counsel asked whether plaintiff had testified that she went to defendant in 2007 because he was a "renowned" plastic surgeon. Plaintiff agreed she had so testified. Counsel asked for how long plaintiff had known defendant was a renowned plastic surgeon, and she responded, "Many years. . . . [¶] . . . [¶] . . . A couple decades . . . probably the beginning of the '90s." When asked how she knew that, plaintiff testified "I knew that because I had a lot of friends that were doctors. . . ." Counsel asked whether she knew that because she "saw him for surgeries in the 1990's . . . ?" Plaintiff's counsel objected based on the motion in limine.

At sidebar, defense counsel argued that the inquiry was relevant to impeachment. The court concluded the question did not violate the motion in limine, and indicated it would allow

questioning to establish a doctor-patient relationship between plaintiff and defendant since the 1990's. However, if defendant wanted to discuss the prior surgeries, the court indicated "we have to do a 402 for that."

Defense counsel asked plaintiff whether during her consultation with defendant in 2007, they compared her face to photographs taken 10 years prior. Counsel objected on the basis of foundation and speculation. Counsel did not object on the basis of the motion in limine. The objection was overruled.

Defense counsel also asked, "The . . . reason that you trusted [defendant] is because you had a patient-physician relationship with him since the 1990's, true?" No objection was made.

iii. Cross-examination of plaintiff's expert

Defense counsel asked if Dr. Shamoun had the impression plaintiff had prior eyelid surgeries before seeing him. Plaintiff objected on the basis of speculation, and the motion in limine. At sidebar, defense counsel argued that the expert had, on direct examination, testified to multiple eyelid surgeries. The court indicated that it would need to conduct a further Evidence Code section 402 hearing to explore the earlier surgeries. Defense counsel moved on.

Later during cross-examination, counsel asked whether Dr. Shamoun had seen plaintiff "in the past for, as you told us in deposition, some body-cont[o]uring procedures and some issue about her eye?" Plaintiff objected on the basis of relevance, and the motion in limine. The court asked for a sidebar, but defense counsel pledged he would move on.

iv. Defendant's testimony

During *plaintiff's* examination of defendant, when asked about his 2007 consultation with plaintiff, defendant testified that he and plaintiff compared current photographs to photographs taken 10 years earlier, and that they noticed some increased droopiness in her eyes. Plaintiff did not object.

He also testified that he referred plaintiff to a doctor in New York following the 2012 surgery because "she was going to New York . . . because she had issues from her liposuction that she had in the past. . . ." Plaintiff objected, without stating the basis of the objection, and moved to strike the testimony. The motion was granted.

The next day, before defendant's testimony resumed, the court noted that the parties had a brief discussion, off the record, about defendant's testimony, and his reference to "multiple surgeries." The court discussed the motion in limine, and the need for further Evidence Code section 402 hearings as to the prior surgeries, and defendant confirmed that he did not intend to introduce any evidence of those prior surgeries. The court was concerned about "fix[ing]" a statement by defendant that plaintiff had undergone 12 prior eyelid surgeries.[1] The court suggested the parties could conduct a further section 402 hearing to determine the admissibility of the prior surgeries, or the court could provide a limiting instruction to the jury. Defendant stated that "I do not wish to have an additional 402 hearing." Therefore, the court decided to give a limiting instruction.

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[1] Neither plaintiff nor defendant has cited to the offending testimony by defendant, and our review of the record does not disclose that defendant testified to the particular number of prior surgeries.

Before Dr. Kawamoto resumed his testimony, the court admonished the jury that "[t]he only surgeries that are at issue in this case that are properly to be considered by you is 2007, 2010, 2012. So it is during the time period from 2007 through the present. That's the only time period that's relevant for your purposes."

During the direct examination of Dr. Kawamoto, defense counsel asked him about notes he took for a consultation with plaintiff before the 2012 surgery. When asked what he was referring to with a note indicating "may think about a lift or some work around the eyes," Dr. Kawamoto responded, "Probably a face lift, but that would have been her third one." Plaintiff did not object. When asked about a note in his records indicating that ptosis surgery "might have some dry symptoms," defendant testified that "we did a lot of operations on her eyelid already. By opening up the eye a little bit more, the opening, it could get a little bit more wind and whatnot in there . . . ." Plaintiff did not object.

v. Defendant's expert

Defense counsel asked Dr. Dresner whether thin and friable skin could lead to the injury sustained by plaintiff. Dr. Dresner testified that he "could see from [plaintiff's] history and the records how many surgeries she has had. She has had many surgeries, cosmetic surgeries in general and a number of surgeries in the upper eyelid and lower eyelid. [¶] The more you operate, the more scar tissue, the more the vascular supply to the eyelid can be compromised, and you can have very thin and friable skin." Plaintiff did not object.

vi. Closing argument

In her closing argument, plaintiff's counsel attacked the opinion of Dr. Dresner, arguing that "according to him, multiple surgeries had something to do with the thin and friability of her eyelid margin. But did he specifically tell you which surgeries, what type of surgery, the nature of those surgeries, when those surgeries occurred? He did not investigate before he rendered those opinions. His entire opinion is based on generalities and assumptions that are not rooted in a factual analysis."

During defendant's closing, counsel argued that "you've learned that there are certain risks that can and do occur, especially in a patient like [plaintiff] who has had multiple procedures done in the same area of her face." He highlighted the instruction addressing witness credibility, and discussed how plaintiff had a "hard time" answering his questions about when she began her relationship with defendant as a patient. "There was a suggestion yesterday that [plaintiff] started her treatment with [defendant] for reconstructive purposes and you were told you don't know anything about what happened between 1990 and 2007. Yes, you do. What did Dr. Shamoun tell you . . . ? [¶] . . . [¶] What he told you was [plaintiff] presented to [defendant] on multiple occasions for cosmetic surgery, including . . . eyelid surgery. . . . He told you she came back over and over again . . . before 2007. [¶] Why are they trying to suggest to you that there was reconstructive surgery in 1991 and nothing until 2007?"[2] Plaintiff never objected.

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[2] During her cross-examination of defendant, plaintiff's counsel asked if he had performed a reconstructive jaw surgery upon plaintiff. He responded, "Yes, 1990 or '91."

b. Analysis

It is misconduct for an attorney to intentionally mention to the jury any matter the court has ordered the attorney not to mention, or to elicit testimony in violation of that order. (See, e.g., *People v. Stanley* (1995) 10 Cal.4th 764, 815.) " '[T]o preserve for appeal an instance of misconduct of counsel in the presence of the jury, an objection must have been lodged at trial.' " (*Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 794.) A judgment will not be reversed for misconduct unless it was prejudicial. We also presume that the jury followed the trial court's instructions. (*Ibid.*)

Here, plaintiff failed to object to numerous instances of alleged misconduct. She failed to object to counsel's remarks in his opening statement, to some of the questions posed to plaintiff during her cross-examination, to the testimony of defendant's expert, to some of defendant's testimony concerning past procedures, and to counsel's remarks during closing argument.

Plaintiff has accordingly forfeited the claim of error as to these remarks. "[T]he appellate court's discretion to excuse forfeiture should be exercised rarely and only in cases presenting an important legal issue." (*In re S.B.* (2004) 32 Cal.4th 1287, 1293.)

Moreover, we find no misconduct. Much of the challenged testimony and argument simply *responded to plaintiff's evidence and argument*. For example, plaintiff's own expert testified to plaintiff's many surgical procedures. And plaintiff, in her closing argument, attempted to gain a tactical advantage from the absence of evidence of prior procedures, when she impugned the opinion of defendant's expert.

Lastly, even if we assumed that misconduct occurred (a finding we do not make), plaintiff cannot demonstrate prejudice. Evidence of plaintiff's significant surgical history was before the jury, irrespective of any remarks made by defense counsel. Plaintiff's own expert testified extensively regarding plaintiff's long history of surgical procedures. (*Pool v. City of Oakland* (1986) 42 Cal.3d 1051, 1069-1070 [standard for prejudice is whether it is reasonably probable the appellant would have obtained a more favorable result but for the error].) Also, the court admonished the jury that any evidence of prior surgeries was irrelevant, and was not to be considered, and we presume the jury followed that instruction.

2. Sufficiency of the Evidence

Next, plaintiff contends defendant did not provide substantial evidence to rebut the presumption of negligence under her theory of res ipsa loquitur. She contends that defendant's expert admitted that his opinion was speculative. We are not persuaded.

The doctrine of res ipsa loquitur is not a rule of substantive law imposing liability, but is a rule of evidence giving rise to an inference of negligence in certain cases. (*Brown v. Higbee* (1959) 175 Cal.App.2dSupp. 917, 922.) " 'It does not shift the burden of proof in a case, but presents an inference of culpability which, if left *unexplained by the defendant*, is deemed satisfactory evidence of his negligence. If the defendant offers an explanation of the occurrence which is entirely consistent with due care, the inference of culpability is dispelled.' " (*Ibid.*)

" 'The burden on defendant is merely that of going forward with the evidence, as distinguished from the burden of establishing the affirmative of the issue by a preponderance of

the evidence . . . and that defendant has successfully discharged his burden when he has introduced evidence of *sufficient weight to offset the presumption in the minds of the jury and produce a balance in their minds on the question of its truth*.' " (*Ibid.*)[3]

Here, Dr. Dresner opined that the most likely cause for plaintiff's injury was thin, friable skin or poor vascular supply. Plaintiff contends his opinion does not constitute substantial evidence, because it was based on pure speculation. (See *People v. Perez* (1992) 2 Cal.4th 1117, 1133 [speculation is not substantial evidence].) We are not persuaded. Dr. Dresner based his opinion on his extensive experience conducting eye surgeries, a review of plaintiff's medical records, and his examination of plaintiff.

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[3] The jury was instructed as follows on the doctrine of res ipsa loquitur: "[Plaintiff] may prove that [defendant's] negligence caused her harm if she proves all of the following: [¶] Number one, that [plaintiff's] harm ordinarily would not have occurred unless someone was negligent. In deciding this issue, you must consider only the testimony of the expert witnesses. Number two, that the harm occurred while [plaintiff] was under the care and control of [defendant]. And, number three, that [plaintiff's] voluntary actions did not cause or contribute to the events that harmed her. [¶] If you decide that [plaintiff] did not prove one or more of these things, then you must decide whether [defendant] was negligent in light of the other instructions I have read. [¶] If you decide that [plaintiff] proved all of these three things, you may, but are not required, to find that [defendant] was negligent, or that [defendant's] negligence was a substantial factor in causing [plaintiff's] harm."

DISPOSITION

The judgment is affirmed. Respondent is awarded costs on appeal.

GRIMES, Acting P. J.

WE CONCUR:

STRATTON, J.

WILEY, J.